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Fourth report on the provisional application of treaties

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Introduction

1. In his third report on the provisional application of treaties,[1] submitted in June 2015 for consideration by the International Law Commission, the Special Rapporteur undertook the study of the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties[2] (hereinafter the 1969 Vienna Convention), namely articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt servanda*), and 27 (Internal law and observance of treaties).[3]

2. The above-mentioned report also analysed provisional application in relation to international organizations, focusing on provisional application of treaties establishing international organizations or international regimes, provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations and provisional application of treaties to which international organizations are party. To that end, it had the valuable support of a memorandum[4] by the Secretariat on legislative development of article 25 of the Vienna Convention between States and International Organizations or between International Organizations[5] (hereinafter the 1986 Vienna Convention).

3. Also in his third report, the Special Rapporteur presented six draft guidelines for referral to the Drafting Committee of the Commission. The plenary decided to refer these draft guidelines to the Drafting Committee, which provisionally adopted draft guidelines 1 to 3.[6] It is expected that the Commission, at its sixty-eighth session in 2016, will request the Drafting Committee to continue its work from the point where it stopped in 2015.

4. Meanwhile, the debates in the Sixth Committee of the General Assembly continue to contribute to the study on the practice and legal effects of provisional application. At the seventieth session of the General Assembly, 32 delegations, including the European Union and the States usually associated with its statements in the Sixth Committee, intervened on the topic of the provisional application of treaties, representing a significant increase compared to the interventions during the sixty-ninth session.[7]

5. In general, the delegations agreed that the provisional application of treaties produces legal effects. However, they underlined the importance of qualifying the scope of these legal effects and of differentiating them, where necessary, from those derived from the entry into force of the treaty. There also seemed to be agreement that the breach of an obligation derived from the provisional application of a treaty gives rise to the international responsibility of the State in question.

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[1] *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687.

[2] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969). United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443.

[3] *Yearbook... 2015*, vol. II, (Part One), document A/CN.4/687, para. 31.

[4] Ibid., document A/CN.4/676.

[5] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986). E/CONF.129/15.

[6] *Yearbook... 2015*, vol. II (Part Two), paras. 250-251.

[7] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (A/CN.4/689), pp. 17-19, and statements by delegations during the Sixth Committee debate.

6. It was noted that the provisional application of a treaty does not modify or alter its content. Delegations pointed out the value of analysis of provisional application with respect to other provisions of the 1969 Vienna Convention. Accordingly, it was suggested that the Special Rapporteur should focus mainly on issues relating to the reservations regime and the regime pertaining to suspension, invalidity and termination of a treaty.

7. With regard to the expected result of the consideration of this topic by the Commission, there was general support for the preparation of guidelines, together with the possible formulation of model clauses. This would be subject to the stipulation, first, that the guidelines should be accompanied by commentaries offering clarification of their content and scope and second, that any evolving model clauses should be flexible enough so as not to prejudge either the will of the parties involved or the vast repertoire of possibilities that have been observed in practice with respect to the provisional application of treaties.

8. The Special Rapporteur also thanks all the delegations that formulated specific comments on the draft guidelines submitted in the third report. These observations, suggestions and recommendations have been duly taken into account and will be used to guide the discussions to take place in the Commission's Drafting Committee.

I. Continuation of the analysis of views expressed by Member States

9. Up until the date of culmination of the third report, the Commission had received comments on the national practice of 19 States: Germany, Austria, Botswana, Cuba, Spain, United States, Russian Federation, Finland (on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)), Mexico, Micronesia (Federated States of), Norway, United Kingdom, Czech Republic (which sent additional comments), Republic of Korea and Switzerland.[8] These comments were considered in the third report.

10. In addition, the Commission has received new comments from Australia, the Netherlands, Paraguay and Serbia. As on previous occasions, none of the comments stated that the provisional application of treaties was prohibited by their internal law. Nonetheless, Australia, the Netherlands and Serbia noted that their respective legislations established an internal process that must be followed in order for the provisional application of a treaty to be accepted, while Paraguay indicted that there was no rule governing the provisional application of treaties.

11. With regard to practice, Paraguay notes that in recent years it has signed only one bilateral treaty that provides for provisional application, namely the Agreement between the European Community and the Republic of Paraguay on certain aspects of air services.[9] Article 9 of this treaty reads as follows:

> Entry into force and provisional application
>
> 1. This Agreement shall enter in force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed.

[8] *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687, paras. 15-16.

[9] Signed in Brussels on 22 February 2007, *Official Journal of the European Union* L122, 11.5.2007.

2. Notwithstanding paragraph 1, the Parties agree to apply this Agreement provisionally from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.

3. Agreements and other arrangements between Member States and the Republic of Paraguay which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I (b). This Agreement shall apply to all such agreements and arrangements upon their entry into force or provisional application.

12. In addition, Serbia reported that only 3 of the 468 treaties it has signed in the past four years provided for provisional application.[10]

13. Lastly, the Netherlands explained that, in accordance with its internal law, provisional application of a treaty is permitted only where the interests of the State so require and where there is no conflict between the treaty in question and the Constitution of the Netherlands, in which case provisional application is prohibited.[11]

14. Despite the scant information received this year, the Special Rapporteur had access to an analytical report by the Council of Europe and the British Institute of International and Comparative Law, concerning the internal legal provisions of its 47 member States and 5 observer States on the signing of treaties and the forms of manifestation of consent to be bound by a treaty.[12]

15. This report lists the internal legislation of the member States and observers of the Council of Europe, based on a questionnaire distributed to these States. With regard to provisional application, it points out the variety of situations and distinguishes between legal systems that generally admit provisional application, those that allow it provided that certain requirements are met and, lastly, those that prohibit it. The report concludes that, with the exception of five States whose internal law prohibits provisional application, no provision expressly prohibiting it could be found in respect of the other States.

II. Relationship of provisional application to other provisions of the 1969 Vienna Convention

16. This chapter continues the analysis undertaken in the third report, which examined the relationship of provisional application to other provisions of the 1969 Vienna Convention, in particular articles 11, 18, 24, 26 and 27.[13]

17. The focus here is on issues raised by several delegations in the debates of the Sixth Committee of the General Assembly, such as those relating to the study of

[10] Comments by Serbia, 29 January 2016, on file in the Codification Division, United Nations Office of Legal Affairs.

[11] Comments by the Netherlands, 26 April 2016, on file in the Codification Division, United Nations Office of Legal Affairs.

[12] See Council of Europe and British Institute of International and Comparative Law (eds.), Treaty Making — Expression of Consent by States to Be Bound by a Treaty/*Conclusion des traités- Expression par l'Etat du consentement à être liés par un traité*, The Hague, Kluwer Law International, 2001, pp. 82-87.

[13] *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687, paras. 27-70.

provisional application and its legal effects. In particular, it was suggested that the Special Rapporteur should study the regime of reservations, invalidity of treaties, termination and suspension arising out of a breach, and cases of succession of States.

18. The main objective of these analyses is to help shed more light on the legal regime of provisional application, without making an exhaustive study of the interpretation of the 1969 Convention. Provisions of the Convention that are not necessarily directly related to provisional application were therefore omitted.

19. This last-mentioned category includes articles 7 to 10 of the 1969 Vienna Convention, which refer to the requirements surrounding the adoption or authentication of the text of a treaty. It is unnecessary to study these provisions, since article 25 offers enough flexibility to allow for agreement on the provisional application of all or part of a treaty, and what is important, at the time of interpreting a concrete situation, is to determine that the negotiating States have agreed "in some other manner" if the treaty has made no provision in that regard. Moreover, articles 7 to 10 must be applied where necessary in order to adopt or authenticate the text of the agreement by which provisional application is agreed.

20. The same is true of articles 11 to 13 of the 1969 Vienna Convention, which refer to the means of expressing consent to be bound by a treaty. The negotiating States frequently adopt one means or another to agree to provisional application; however, observed practice does not indicate a preference for any one means in particular.

21. Since the institution of provisional application generally terminates with the entry into force of the treaty, it does not appear necessary to consider articles 14 to 16 of the 1969 Vienna Convention, which establish means that, in most cases, assume the completion of the constitutional requirements necessary in each State for the entry into force of the treaty.

A. Part II, Section 2: *Reservations*

22. One of the issues raised on many occasions, both in the debates of the Sixth Committee of the General Assembly and in the Commission, is whether the reservations regime is applicable to the provisional application of treaties.

23. As in the case of provisional application, the reservations regime will be determined, in the first place, by what the treaty stipulates. Article 19 of the Vienna Convention clearly indicates that a State may formulate a reservation unless the reservation is prohibited by all or part of the treaty, and in cases where it is not prohibited by the treaty, the reservation in question must not be incompatible with the object and purpose of the treaty. In other words, in both cases, the Convention establishes a regime that sets conditions on the terms of the treaty.

24. The reservations regime in treaty law is codified in Part II, Section 2, of the 1969 Vienna Convention and covers matters relating to the formulation of reservations, acceptance of and objection to them, their legal effects, their withdrawal and procedures regarding them. This is such a complex topic that the Commission devoted a part of its agenda to it for nearly two decades (1993-2011). As a result of this analysis, the Commission adopted the text, with commentaries, of a Guide to Practice on Reservations to Treaties.[14]

[14] *Yearbook... 2011*, vol. II (Part Three), paras. 1-2.

25. It is not the Special Rapporteur's intention to reconsider the study already carried out on the reservations regime in treaty law. The objective here is merely to analyse whether the formulation of reservations is compatible with the regime governing the provisional application of a treaty.

26. Both the 1969 Vienna Convention and the above-mentioned Guide to Practice are silent about the possibility of formulating reservations in the context of the provisional application of a treaty. This is because, in accordance with article 19 of the Convention, a State may formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty, in other words, when motivated by any of the acts by virtue of which the State places on record, at the international level, its consent to be bound by the treaty.

27. Given that provisional application does not prejudge the decision that the State adopts *in fine* with respect to being definitively bound by the treaty, it is logical that the matter of reservations has not been addressed in the provisional application phase. In other words, the formulation of reservations is directly associated with the above-mentioned procedural stages.

28. Although there are many different forms and stages of consent to the provisional application of a treaty, a topic analysed by the Special Rapporteur in his first report on the provisional application of treaties,[15] it is interesting to note that many of the treaties cited by the Special Rapporteur in his three reports provide that provisional application may be decided at any of the procedural stages mentioned above, but without in any way pronouncing on the possibility of formulating reservations in relation to the regime established under provision application.

29. For example, article 18 of the Convention on Cluster Munitions stipulates the following:

> Any State may, *at the time of its ratification, acceptance, approval or accession*,* declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.[16]

30. Likewise, article 18 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction provides as follows:

> Any State may, *at the time of its ratification, acceptance, approval or accession*,* declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.[17]

31. More recently, article 23 of the Arms Trade Treaty set out the following:

> Any State may, *at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession*,* declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.[18]

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[15] *Yearbook... 2013*, vol. II (Part One), document A/CN.4/664, paras. 43-47.

[16] Convention on Cluster Munitions (Dublin, 30 May 2008). United Nations, *Treaty Series*, vol. 2688, No. 47713, p. 39. *Emphasis added.

[17] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997). Ibid., vol. 2056, No. 35597, p. 211. *Emphasis added.

[18] Arms Trade Treaty (New York, 28 March 2013). A/CONF.219/2013/L.3. *Emphasis added.

32. Whatever the form or procedural stage of the consent to accept provisional application, but especially if it takes the form of an agreement separate from the treaty, it will constitute a treaty in all senses of the term, in accordance with the definition in article 2, paragraph 1 (a), of the 1969 Vienna Convention.

33. One conclusion that may be drawn from this analysis is that a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time.

34. Nonetheless, given that throughout the Special Rapporteur's study no treaty has yet been seen that provides for the formulation of reservations as from the time of provisional application, nor have provisional application provisions been encountered that refer to the possibility of formulating reservations, and in the absence of proof of any type of practice in this regard, it is unnecessary to make an analysis in the abstract, as has been suggested.[19] As a corollary, no case has been identified in which a State has formulated reservations at the time of deciding to apply a treaty provisionally. Perhaps the reason for this is that it is much simpler for States ***not to include*** provisions in respect of provisional application on which they would have been required to formulate reservations.

35. The pending question seems to be the following: if a treaty is silent about the formulation of reservations, may a State formulate them at the time of agreeing to the provisional application of a treaty? The question is also valid in the case where the treaty is silent about the possibility of its provisional application.

36. In the Special Rapporteur's view, nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty.

37. This view is primarily contingent on two elements: first, that the provisional application of treaties produces *legal effects* and, second, that the purpose of the reservations is precisely to exclude or modify the *legal effects* of certain provisions of the treaty on that State. Under a similar hypothesis, the reservations regime referred to at the beginning of this chapter would be applicable, *mutatis mutandis*, to the provisional application regime, as has been suggested for the regime of international responsibility.[20]

38. It is important to note that this hypothesis does not prevent States with respect to which a contractual relation is generated under the provisional application regime from objecting to the reservation.

39. In the case of a multilateral treaty, the Secretary-General, in performing his depositary functions for treaties signed under the auspices of the United Nations, would circulate the declaration to negotiating States without comment and would allow these States to determine their legal position[21] and whether the proposed reservation is compatible with the object and purpose of the treaty.[22]

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[19] Statement by the Czech Republic, *Official Documents of the General Assembly*, seventieth session, Sixth Committee, 24th meeting (A/C.6/70/SR.24), paras. 48-50.

[20] See *Yearbook... 2014*, vol. II (Part One), document A/CN.4/675, paras. 91-95.

[21] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev.1. (United Nations publication, Sales No. E/94/V.5) para. 178.

[22] Palitha T. B. Kohona, "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33 (2004-2005), pp. 415-450, esp. p. 440.

B. Part V, Section 2: *Invalidity of treaties*

40. Part V, Section 2, of the 1969 Vienna Convention refers to the regime of invalidity of treaties. This section includes eight articles presenting the reasons that may give rise to annulment, namely: provisions of internal law regarding competence to conclude treaties (art. 46); specific restrictions on authority to express the consent of a State (art. 47); error (art. 48); fraud (art. 49); corruption of a representative of a State (art. 50); coercion of a representative of a State (art. 51); coercion of a State by the threat or use of force (art. 52); and treaties conflicting with a peremptory norm of general international law (*jus cogens*) (art. 53).

41. In the Sixth Committee of the General Assembly, a number of delegations have expressed interest in the relationship that may exist between provisional application and the regime of invalidity of treaties, specifically article 46 of the 1969 Vienna Convention.[23]

42. Article 46 of the 1969 Vienna Convention provides as follows:

> *Provisions of internal law regarding competence to conclude treaties*
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless that violation was manifest and concerned a rule of its internal law of fundamental importance*.*
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.[24]

43. To a certain extent, the particular interest elicited by article 46 of the 1969 Vienna Convention in relation to provisional application stems from the question as to what extent the regime set out in article 25 of the Convention constitutes a sort of subterfuge for failing to comply with the requirements imposed by the internal law of each State, as far as the manifestation of consent to be bound by a treaty is concerned.

44. Thus, it might be suggested that article 46 entails the need to determine, prior to agreeing on provisional application, whether doing so would violate "a rule of internal law of fundamental importance", thereby providing grounds for the invalidity of the treaty.

45. It would be neither correct nor reasonable to proceed in this way, in view of the following: (a) Article 46 only refers to the "violation of a provision of [...] internal law regarding the *competence to conclude treaties*"* and should concern "a rule [...] of *fundamental importance*";*[25] (b) The rule contained in article 27 of the Vienna Convention makes no distinction between the provisions of internal law and stipulates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"; and (c) nothing in article 25 entails

[23] Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Documents of the General Assembly*, seventieth session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23), para. 115; United Kingdom, ibid., 24th meeting (A/C.6/70/SR.24), para. 27; Romania, ibid., para. 56.

[24] Emphasis added.

[25] Emphasis added.

the obligation for States contemplating provisional application to proceed, as a prerequisite, to a determination concerning the internal law of any of the parties involved on the basis of article 46.

46. The third report has already dealt with the question of the relationship between internal law and observance of treaties (art. 27 of the 1969 Vienna Convention).[26] It concluded that "once a treaty is being provisionally applied, internal law may not be invoked as justification for failure to comply with the obligations deriving from provisional application".[27]

47. The debate in both the Commission and the General Assembly made it clear that no reference to internal law under any circumstances should be included in the draft guidelines, so as not to create the false impression that the provisional application regime would be subordinated to the internal law of States.

48. In any event, any substantive incompatibility that may arise will be governed by the principle of the primacy of international law; and even in cases of procedural violations, which might fall under article 46, such violations must be manifest and must concern a rule of fundamental importance.[28]

49. Another very different phenomenon occurs when the treaty expressly refers to the internal law of the negotiating States and subjects the provisional application of the treaty to the condition that it would not constitute a violation of internal law.

50. The *Yukos*[29] and *Kardassopoulos*[30] cases, which analyse the provisional application of the Energy Charter Treaty, provide excellent examples of controversies that have recently arisen.

51. The Special Rapporteur has already referred to these cases in previous reports.[31] Article 45 of the Energy Charter Treaty, which was also cited in the first report,[32] provides as follows:

> Provisional Application
>
> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, *to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*.
>
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

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[26] *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687, paras. 60-70.

[27] Ibid., para. 70.

[28] See Michael Bothe, "Article 46" in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties. A commentary*, vol. II, Oxford, 2011, pp. 1090-1099, esp. p. 1094.

[29] Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, provisional award on competence and admissibility, 30 November 2009, Case No. AA 227.

[30] Ioannis Kardassopoulos v. Georgia, award on jurisdiction of 6 July 2007, ICSID Case No. ARB/05/18, available at http://icsid.worldbank.org/ICSID/.

[31] *Yearbook... 2014*, vol. II (Part One), document A/CN.4/675, para. 29; *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687, paras. 62-66.

[32] *Yearbook... 2013*, vol. II (Part One), document A/CN.4/664, para. 45.

(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, *to the extent that such provisional application is not inconsistent with its laws or regulations*.*

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

(7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.*[33]

52. The underlying theme in the above-mentioned cases has been the possible existence of a conflict arising out of the incompatibility between the constitution of

[33] * Emphasis added.

a State, on the one hand and, on the other hand, the provisional application of the Energy Charter Treaty, in whole or in part.[34]

53. In the first instance, the decision to sign or not to sign the treaty would appear to be sufficient proof that such determination has been made by the State concerned, acting in good faith, and independently of the possibility of resorting to provisional application.

54. In the *Yukos* case, the issue was resolved at various levels. Although article 45, paragraph (2) (a), expressly provides that any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application, this would seem to suggest that, if a signatory State does not submit such a declaration, it is accepting the real possibility of applying the treaty provisionally, as provided for in article 45, paragraph 1.[35]

55. Given that the Russian Federation signed the Treaty without delivering a declaration of conformity with article 45, paragraph 2, the arbitral tribunal in the *Yukos* case analysed whether the principle of provisional application as such was incompatible with Russian internal law. Finding no conflict, the tribunal decided that the Russian Federation was subject to the provisional application regime as a whole, including article 26, which served as a basis for the Permanent Court of Arbitration to establish its competence, from the date of its signature until the date on which it delivered its decision to terminate the provisional application.

56. However, the issue that continues to give rise to controversy, as we shall see, is that relating to the determination of the existence of an incompatibility between the provisions of the treaty and the constitution of a signatory State, that is, a rule of fundamental importance in the terms of article 46 of the 1969 Vienna Convention.

57. In the first place, the argument that the other signatories are responsible for ascertaining, to some extent, that there is no incompatibility that is being ignored by another signatory with respect to its internal laws and for pointing out such incompatibility where it exists, which seems to underlie the reasoning of the arbitral tribunals that heard the *Yukos* and *Kardassopoulos* cases, respectively, has been sharply challenged in the legal literature, it being considered that it is unreasonable to require each signatory to review the diversity of internal laws of its contractual partners.[36]

58. Thus, for example, Canada has pointed out the relevance of article 46 of the 1969 Vienna Convention with respect to provisional application, and that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal law.[37] If we adhere to a basic criterion of legal certainty,

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[34] See Alex M. Niebruegge, "Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law", *Chicago Journal of International Law*, vol. 8, No 1 (2007-2008), pp. 355-376, esp. p. 369.

[35] See Matthew Belz, "Provisional Application of the Energy Charter Treaty: *Kardassopoulos v. Georgia* and improving provisional application in multilateral treaties", *Emory International Law Review*, vol. 22, No. 2 (2008), pp. 727-760, esp. p. 748.

[36] See Mahnoush H. Arsanjani and W. Michael Reisman, "Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards", in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, Oxford University Press, 2011, pp. 86-102, esp. pp. 95-96.

[37] Statement by Canada, *Official Documents of the General Assembly, seventieth session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25), para. 59.

it would be reasonable to assume that such determination would be made *a priori*, and not *a posteriori*.

59. However, on 20 April 2016, a district court in the Netherlands resolved three disputes submitted by the Russian Federation against the companies *Veteran Petroleum Limited*, *Yukos Universal Limited* and *Hulley Enterprises Limited*. The case argued by the Russian Federation sought to annul the decisions contained in the *Yukos* awards of 30 November 2009 and 18 July 2014, respectively.[38]

60. The Russian Federation held that the provisional application of the Treaty, established on the basis of article 45, could not include article 26 (Settlement of Disputes between an Investor and a Contracting Party), since the decision to accept provisional application in relation to this provision of the Treaty was the responsibility of other authorities within the structure of the Russian State. In the contrary case, the decision would be a violation of the Russian Constitution.

61. The Netherlands tribunal found that, in the light of the ordinary meaning of the terms of article 45, the wording does not indicate that the Limitation Clause of paragraph 1 depends on the submission of a declaration under paragraph 2.[39] In other words, paragraph 2 of article 45 does not constitute the procedural rule that must be followed in order to exclude the provisional application of the Treaty under paragraph 1 of article 45.[40] Thus, the tribunal concluded that the Russian Federation was not obliged to submit a declaration in accordance with article 45, paragraph 2 (a), of the Energy Charter Treaty for a successful reliance on the limitation clause contained in article 45, paragraph 1.[41]

62. After conceding that the limitation clause in article 45, paragraph 1, can be invoked *even at a time subsequent to the signature and without being obliged to submit the declaration provided for in paragraph 2*, the Netherlands tribunal proceeded to analyse whether acceptance of provisional application by means of the signature included article 26 of the Treaty. This required an extensive analysis of the principle of the separation of powers in the Russian legal system in order to examine the procedure by which the State could accept the jurisdictional clause contained in article 26 of the Treaty.[42]

63. Lastly, the tribunal concluded that from the interpretation of article 45, paragraph 1, of the Treaty, it followed that the provisional application did not oblige the Russian Federation to observe article 26, since it was incompatible with the Constitution of the Russian Federation, and the Russian Federation had never made an unconditional offer with respect to possible arbitration. The Permanent Court of Arbitration had therefore committed an error in declaring itself competent in the dispute.[43] Consequently, the Netherlands tribunal quashed the *Yukos* awards.[44]

64. One view suggests that, beyond the analysis of the interpretation of provisional application, the difference of approaches between an arbitral tribunal

[38] C/09/477160/HA ZA 15-1; C/09/477162/HA ZA 15-2; C/09/481619/HA ZA 15-112. Available at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230.
[39] Ibid., para. 5.27.
[40] Ibid.
[41] Ibid., para. 5.31.
[42] Ibid., paras. 5.74-5.95.
[43] Ibid., paras. 5.95-5.96.
[44] Ibid., paras. 6.1-6.9.

and a national court may mean that each assigns different weights to the interests of the investors, on the one hand, and State sovereignty, on the other.[45]

65. Without doubt, it would be premature to advance any conclusion derived from this decision by an internal tribunal, since the parties affected could appeal the judicial decision.

66. From the point of view of international law, it is clear that, in respect of provisions of internal law concerning *competence to conclude treaties*, article 46 refers to a different aspect from that referred to in article 27 of the 1969 Vienna Convention with regard to *observance of treaties and in no way conditions its application*.

67. Nevertheless, these cases, taken as a whole, confirm that provisional application produces legal effects; otherwise, it would be irrelevant to have to prove whether or not the acceptance of provisional application is compatible with the constitutional norms of a State, in order to determine the scope of the obligations contracted under provisional application or the international responsibility that might arise from a possible violation of those obligations.

68. Beyond the relationship between article 25 and article 26 of the 1969 Vienna Convention, the scope and duration of provisional application, given its relative infancy in the world of customary international law, as well as the validity of the theory as a whole, require further clarification.

C. Part V, Article 60: *Termination or suspension of the operation of a treaty as a consequence of its breach*

69. The first report of the Special Rapporteur refers to the forms of termination of provisional application;[46] the second report explores the extinction of the legal effects of provisional application as a result of termination, including an analysis of article 70 of the 1969 Vienna Convention concerning the consequences of termination;[47] it is therefore unnecessary to repeat these considerations.

70. Termination of provisional application is governed by the second paragraph of article 25 of the 1969 Vienna Convention, which provides that:

> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

71. In that context, it is unnecessary to address all the situations envisaged in Part V, Section 3, of the 1969 Vienna Convention with respect to the termination of treaties. However, it is appropriate to analyse article 60, on the termination or suspension of the operation of a treaty as a consequence of its breach, since

[45] See Johannes Fahner, "The Empire Strikes Back: Yukos-Russia, 1-1", 26 May 2016, Blog of the European Journal of International Law. Available at: http://www.ejiltalk.org/the-empire-strikes-back-yukos-russia-1-1/.

[46] *Yearbook... 2013*, vol. II (Part One), document A/CN.4/664, paras. 48-52.

[47] *Yearbook... 2014*, vol. II (Part One), document A/CN.4/675, paras. 69-85.

practice, as illustrated in that of the European Union, does not appear to subject termination to the mere assumption underlying article 25, paragraph 2.

72. For their part, a number of delegations in the Sixth Committee of the General Assembly have indicated the importance of addressing the relationship with article 60.[48]

73. Article 60 of the 1969 Vienna Convention reads as follows:

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) A repudiation of the treaty not sanctioned by the present Convention; or

(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to pro visions prohibiting any form of reprisals against persons protected by such treaties.

74. As noted in the second report, in the terms of article 60 of the 1969 Vienna Convention, "the breach of a treaty applied provisionally may also give rise to the termination or suspension of provisional application by any State or States that have been affected by the breach."[49]

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[48] Greece and Romania, *Official Documents of the General Assembly, seventieth session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Canada, Ireland and Kazakhstan, ibid., 25th meeting (A/C.6/70/SR.25).

[49] *Yearbook... 2014*, vol. II (Part One), document A/CN.4/675, para. 88.

75. The principle of international law underlying the premise put forward in article 60 of the 1969 Vienna Convention, and also referred to in the second report,[50] is *inadimplenti non est adimplendum*. This principle, as we know, modifies the rule of *pacta sunt servanda* by incorporating the concept of negative reciprocity.[51]

76. A first consideration in delving into this analysis is that it is necessary to understand the terms "termination" and "suspension" as referred to in article 60 of the 1969 Vienna Convention, in the context of article 25 in respect of phrases such as "termination of provisional application" or "suspension of provisional application". Article 60 of the Convention would apply to suspension or termination of a treaty that is being provisionally applied by a State as a consequence of a breach by another State.

77. On the other hand, the breach of a norm does not necessarily lead to its abrogation, still less as a sanction on the State that committed the breach.[52] A material breach, in conformity with article 60, paragraph 2, is required.

78. Of course, we are assuming a "material breach" of the treaty that is being applied provisionally, that is, a breach of an essential provision, as referred to in article 60, paragraph 3 (b), since such provisions are directly related to the very roots or bases of the contractual relationship, thereby calling into question the value or possibility of continuing such relationship.[53] In this case, the conditions set out in article 60 would be activated in order to terminate or suspend the provisional application of a treaty.

79. The International Court of Justice (ICJ) has found that only a material breach of the treaty itself, by a State party to that treaty, entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under article 60.[54]

80. Thus, a trivial violation of a provision that is considered essential may constitute a material breach for the purposes of article 60 of the 1969 Vienna Convention.[55]

81. However, since article does not define what is meant by an "essential provision", account must be taken of the reasons motivating the conclusion of the treaty.[56]

82. In the context of provisional application, it might be useful to ask the following question, in analysing whether an "essential provision" has been breached: should the reasons motivating the recourse to provisional application also be taken into account?

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[50] Ibid., para. 89.

[51] See Bruno Simma and Christian J. Tams, "Article 60", in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties. A commentary*, vol. II, Oxford, Oxford University Press, 2011, pp. 1351-1381, esp. p. 1353.

[52] Ibid., p. 1359.

[53] Robert Y. Jennings, "Treaties", in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects*, Paris and Dordrecht, UNESCO and Martinus Nijhoff, 1991, pp. 138-178, esp. pp. 157-158.

[54] See *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7, para. 106. See also *I.C.J Summaries 1997-2002*, p. 1.

[55] See Simma and Tams, "Article 60", p. 1359.

[56] Ibid.

83. The Special Rapporteur does not consider it necessary to meet this second threshold of proof, but there is no doubt that the reasons motivating recourse to provisional application of a particular part of a treaty may constitute evidence of its character as an essential provision within the meaning of article 60, paragraph 3 (b).

84. One example of this is the Arms Trade Treaty, which provides for the possibility of provisionally applying articles 6 and 7 of the Treaty. Article 7, on export and export assessment, is at the core of the Treaty, being directly linked with its object or purpose.[57] In that context, during the negotiations the States welcomed the possibility of provisionally applying these provisions of the Treaty, given their essential character.[58]

85. Beyond the analysis of the elements constituting article 60 of the 1969 Vienna Convention, however, there is an additional issue, perhaps of greater importance, which is at the heart of the discussion concerning the potential relationship between that provision and provisional application. The premise behind reliance on article 60, which also underlies the principle *inadimplenti non est adimplendum*, as obvious as it may seem, is the existence of a treaty *in force* between the parties. In other words, a breach of a contractual obligation cannot be invoked if there is no treaty from which such obligation emanates and if such treaty is not in force.[59]

86. Accordingly, legal doctrine has examined the interval prior to the entry into force of a treaty, but only from the perspective of the existence of possible violations of the obligation not to frustrate the object and purpose of the treaty, and drawing a distinction, in the sense that article 60 of the 1969 Vienna Convention refers only to breaches of treaties ***that are actually in force between the parties***.[60] The Special Rapporteur has found no reference to provisional application in this context.

87. Nevertheless, the Special Rapporteur agrees that the point of departure for identifying a breach that activates the assumptions underlying article 60 of the 1969 Vienna Convention is the existence of a legal relationship arising out of a treaty. Thus, taking into account that, as has been confirmed throughout the study of this topic, provisional application of a treaty produces legal effects as if the treaty were actually in force,[61] and that obligations arise therefrom which must be performed under the *pacta sunt servanda* principle,[62] it may be concluded that in the case of provisionally applied treaties, the prerequisite of the existence of an effective obligation has been met. The conditions therefore exist under which the suspension or termination of a treaty may be sought, in accordance with the provisions of article 60 of the Convention.

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[57] See Clare da Silva and Brian Wood, "Article 7. Export and Export Assessment", in Clare da Silva and Brian Wood (eds.), *Weapons and International Law: The Arms Trade Treaty*, Brussels, Larcier, 2015, pp. 116-139.

[58] Zeray Yihdego, "Article 23. Provisional Application", in Clare da Silva and Brian Wood (eds.), *Weapons and International Law: The Arms Trade Treaty*, Brussels, Larcier, 2015, pp. 289-291.

[59] Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, The Hague, Kluwer Law International, 1996, p. 52.

[60] Ibid., p. 53.

[61] See *Yearbook... 2013*, vol. II (Part One), document A/CN.4/664, para. 37; *Yearbook... 2014*, vol. II (Part One) document A/CN.4/675, para. 24.

[62] *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687, paras. 56-59

D. Part VI, Article 73: *Cases of State succession, State responsibility, and outbreak of hostilities*

88. During the debates in the Sixth Committee of the General Assembly, the Special Rapporteur was asked to address the topic of provisional application as it relates to cases of State succession in respect of treaties, as part of the study on the relationship with other provisions of the 1969 Vienna Convention.[63]

89. Article 73 of the 1969 Vienna Convention refers to cases of State succession, State responsibility and outbreak of hostilities:

> The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

90. The topic of State succession with respect to the effects of treaties has generally been perceived in international law as a problem concerning the legal effects of a treaty in response to a fundamental change of circumstances (*rebus sic stantibus*),[64] which nevertheless must take into account the principle of State continuity in order to prevent, for example, a State from invoking a change of political system, no matter how radical it may be, to take advantage of the principles applicable to State succession.[65] A correct assessment will have to be made on a case-by-case basis, in the light of prevailing circumstances and the conduct of States.

91. With regard to multilateral treaties, a very useful indicator consists in the notifications received by the depositary of the treaty in question. Only when a notification of succession has been deposited with the Secretary-General of the United Nations, for example, does the latter include the State in question on the list of States parties, for which the assignment of rights and obligations is considered effective from the date on which the successor State has communicated its acceptance to the Secretary-General, provided that there are no objections by the other parties.[66]

92. Chapter XII of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* deals exclusively with succession of States.[67] It explains the principles on which the United Nations Secretariat has based itself in performing its functions in such cases.

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[63] Slovenia, *Official Documents of the General Assembly, seventieth session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24), para. 44.

[64] Martti Koskenniemi, "Paragraph 3. Law of Treaties", in Pierre Michel Eisemann and Martti Koskenniemi (eds.), *State Succession: Codification Tested against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff, 2000, pp. 103-106.

[65] René Provost, "Article 73", in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, vol. II, Oxford, Oxford University Press, 2011, p. 1647.

[66] Yolanda Gamarra, "Current Questions of State Succession Relating to Multilateral Treaties", in Pierre Michel Eisemann and Martti Koskenniemi (eds.), *State Succession: Codification Tested against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff, 2000, pp. 387-435, esp. pp. 392-393.

[67] ST/LEG/7/Rev.1, p. 86. United Nations publication, Sales No.: E/94.V.5).

93. Beyond these considerations, the most complete development of the treatment of provisional application of treaties in cases of succession of States is contained in the Vienna Convention on Succession of States in respect of Treaties (hereinafter the 1978 Vienna Convention).[68]

94. Part III, section 4, of that instrument refers exclusively to provisional application of both multilateral and bilateral treaties in the following manner:

Section 4. Provisional Application

Article 27
Multilateral treaties

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, the consent of all the parties to such provisional application is required.

3. If, at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

4. Nevertheless, in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 28
Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned when:

(a) they expressly so agree; or

(b) by reason of their conduct they are to be considered as having so agreed.

[68] Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 125. In force since 6 December 1966.

Article 29
Termination of provisional application

1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 27 may be terminated:

(a) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty and the expiration of the notice; or

(b) in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, by reasonable notice of termination given by the newly independent State or all of the parties or, as the case may be, all of the contracting States and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 28 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned and the expiration of the notice.

3. Unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

95. In its commentary to the draft articles that later became the basis of the Convention, the Commission noted that the importance of provisional application in the context of State succession in respect of multilateral treaties is centred on cases involving the establishment of newly independent States. Accordingly, it was said to be theoretically possible to inform the parties of the new State's intention to provisionally apply the treaty in question and obtain the consent of each party to such provisional participation. However, the Commission noted that this scenario did not occur in practice; what did occur was that provisional application of a treaty was agreed between the newly independent State and a State party on the basis of reciprocity. In the Commission's view, this produces two different legal regimes: that of the multilateral treaty between the parties, on the one hand, and, on the other, that produced in a particular manner between a State party and the new State through the provisional application of that multilateral treaty between them.[69]

96. At that time, the Commission also discussed whether it was necessary to make some reference to reservations in the context of provisional application in cases involving succession of States; it chose to leave the question aside, as it was not essential to the treatment of the topic, and considering that, under the above-mentioned scheme, the multilateral treaty would be applied provisionally, *de facto*, on the basis of bilateral arrangements and it would be possible to resolve any issues concerning reservations during the negotiations on such arrangements.[70]

[69] *Yearbook... 1974*, vol. II (Part One), p. 4, document A/CN.4/278 and Add.1-6, paras. 10 et seq.
[70] Ibid.

97. It should be pointed out, in addition, that article 7, paragraph 3, on temporal application of the 1978 Convention, allows for the provisional application of the Convention:

> 3. A successor State may at the time of signing or of expressing its consent to be bound by the present Convention make a declaration that it will apply the provisions of the Convention provisionally in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

98. What is interesting about this provision is that the declaration of provisional application is dependent on the existence of a declaration of acceptance on the part of any other signatory or contracting State. This would take into account the political assessment that may be implied by the act of accepting the new State as a contracting party, in that it could be interpreted as an element of recognition of such State.

99. Lastly, there is also an express reference to provisional application of the Convention in respect of the effects of a notification of succession. The relevant part of article 23, paragraph 2, provides that:

> the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession *except insofar as that treaty may be applied provisionally in accordance with article 27**or as may be otherwise agreed.[71]

100. This provision permits the continuity of the production of the legal effects of the treaty, even in the absence of a notification of succession.

101. In brief, the provisions of the 1978 Vienna Convention illustrate the practical utility of provisional application of treaties in order to enhance legal certainty in situations generally associated with political instability within a State that give rise to the reconfiguration of its international relations.

III. Practice of international organizations in relation to provisional application of treaties

102. The third report discussed the question of provisional application in relation to international organizations.[72] Part of this analysis considered the provisional application of treaties under which international organizations or regimes are created; the application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations; and provisional application of treaties to which an international organization is a party. Moreover, the Commission benefited from the elaboration by the Secretariat of a memorandum on the legislative development of article 25 of the 1986 Vienna Convention.

[71] * Emphasis added.

[72] *Yearbook....2015*, vol. II (Part One), document A/CN.4/687, paras. 71-129.

103. This chapter is a continuation of that first analysis, focusing more specifically on the depositary functions that may be carried out by international organizations. In the case of the United Nations, an analysis is also made of its work on the registration of treaties, in conformity with Article 102 of the Charter of the United Nations.

104. In addition, with the support of the offices of legal affairs of the secretariats of some regional international organizations, the Special Rapporteur collected more information on the following topics: treaties to which an international organization is a party that provide for provisional application; treaties deposited with an international organization that provide for their provisional application; and treaties that are or have been applied provisionally by an international organization. Accordingly, this chapter will focus on the practice of the Organization of American States (OAS) the European Union, the Council of Europe, the North Atlantic Treaty Organization (NATO) and the Economic Community of West African States (ECOWAS).

A. United Nations

105. The International Court of Justice has held that the United Nations is the *supreme* type of international organization and could not carry out the intentions of its founders if it was devoid of international personality.[73] Indeed, the United Nations has a unique character that is projected in a very special relationship in respect of the law of treaties. In view of its legal capacity, the United Nations may sign treaties.

106. The Secretariat of the United Nations, for its part, performs the functions of registration and publication of treaties, under Article 102, paragraph 1, of the Charter of the United Nations, and carries out the functions of the Secretary-General as depositary of treaties, in the latter case when the treaty so provides.

107. With the valuable assistance of the Treaty Section of the Office of Legal Affairs, a description of how the Secretariat works with respect to the provisional application of treaties, in the framework of its registration functions and the depositary functions of the Secretary-General, is presented below.

1. Registration functions

108. Article 102, paragraph 1, of the Charter of the United Nations stipulates the following:

> Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

Currently, 53,453 original treaties are registered with the United Nations, amounting to more than 70,000 if one includes subsequent original treaties and agreements. Taking into account all. treaties and related actions, the total comes to over 250,000 registrations.[74]

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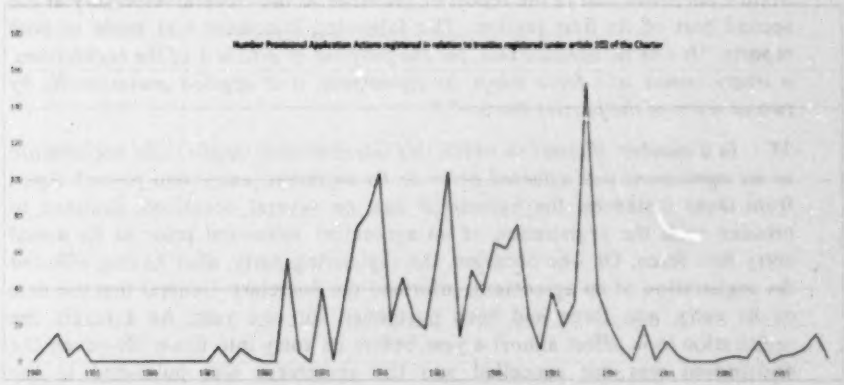
[73] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 179. See also *I.C.J. Summaries 1948-1991*, p. 10.

[74] Registrations may be consulted at https://treaties.un.org.

109. On average, about 2,400 treaties and related actions are registered each year with the United Nations.[75] A detailed review of the information gathered from the registration of actions reveals that in some years the number of registrations is particularly high, owing to the fact that certain treaties elicit a greater number of acceptances of provisional application. For example, mainly due to commodity agreements, there were 56 actions on provisional application in 1968; in 1973, there were 103 such actions; in 1982, 104 were registered; in 1988, 75 were registered; and in 1994, 153 were registered. In the last-mentioned year (1994), 113 of the actions on provisional application registered refer exclusively to the Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.[76] The following graph, provided by the Treaty Section of the Secretariat, shows some points in time when registered provisional application actions were at a peak.

Number of provisional application actions registered in relation to treaties registered under Article 102 of the Charter of the United Nations



110. It is interesting to note that a large part of the registered actions took place subsequently to the entry into force of the 1969 Vienna Convention. This graph also gives an idea of the vast practice that has existed through the years with respect to recourse to provisional application, going beyond the simple inclusion of a provisional application clause in a treaty, but referring to an action taken, i.e., by registration of the recourse to such provisional application directly by the international community. From 1946 to 2015, a total of 1,349 provisional application actions were registered.

111. All these figures serve to place in context the very wide universe of treaty registration under Article 102 of the Charter of the United Nations.

112. On the other hand, in accordance with article 1, paragraph 2, of the regulations on registration adopted by the United Nations General Assembly in 1946, "[r]egistration shall not take place until the treaty or international agreement has

[75] Strengthening and coordinating United Nations rule of law activities. Report of the Secretary-General (A/70/206, 27 July 2015, para. 11).

[76] Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

come into force between two or more of the parties thereto."[77] On the basis of this provision, the standard practice of the Secretariat is to decline to proceed with the registration of treaties until the date of their entry into force. This might suggest *prima facie* that treaties which are applied provisionally but which have not entered into force would not be subject to registration. However, the *Repertory of Practice of United Nations Organs* (1955) describes the practice in the following manner:

> 32. Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of an agreement between two or more parties. However, in adopting this rule at the first part of the first session of the General Assembly, Sub-Committee 1 generally agreed that the term "entry into force" was intended to be interpreted in its broadest sense. *It was the view of the Sub-Committee that, in practice, treaties which, by agreement, were being applied provisionally by two or more parties were, for the purpose of article 1 (2) of the regulations, in force.**
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> 33. This point was stressed both in the report of Sub-Committee 1 to the Sixth Committee and in the report of the latter to the General Assembly at the second part of its first session. The following statement was made in both reports: "*It was recognized that, for the purpose of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto*".*
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> 34. *In a number of cases to which this interpretation applies, the registration of an agreement was effected prior to its definitive entry into force.** Apart from these instances, the Secretariat has, on several occasions, declined to proceed with the registration of an agreement submitted prior to its actual entry into force. On one occasion, the registering party, after having effected the registration of an agreement, informed the Secretary-General that the date of its entry into force had been postponed for one year. As a result, the registration took effect almost a year before its entry into force. However, the registration was not cancelled and the agreement was published in the chronological order of registration with an accompanying explanatory note.[78]

113. Subsequently, in the updated version of the *Repertory of Practice of the United Nations, Supplement No. 3*, this criterion was reiterated, and a more in-depth analysis of this interpretation was made, as follows:

> (h) Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of the treaty or international agreement. However, under an early interpretation given to the term "entry into force" by the Sixth Committee for the purpose of that rule, "a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto". In a number of cases to which that interpretation applies, the registration of a treaty or agreement was effected prior to its definitive entry into force.
>
> (i) Notifications by the parties or specialized agencies of the definitive entry into force of treaties registered before that time clearly fall within the meaning of

[77] General Assembly resolution 97(1) of 14 December 1946, modified by General Assembly resolutions 364 (IV) of 1 December 1949, 482 (V) of 12 December 1955 and 33/141 of 19 December 1978.

[78] *Repertory of Practice of United Nations Organs*, vol. V, *Articles 92-111 of the Charter* (United Nations publication, Sales No: 1955.V.2 (vol. V)), Article 102, paras. 32-34. * Emphasis added.

subsequent actions requiring registration as certified statements under article 2 of the regulations and have been registered by the Secretariat as such. As regards treaties and agreements for which the Secretary-General acts as depositary or to which the United Nations is a party, and which have been registered on provisional entry into force, the Secretariat ex officio registers their *definitive entry into force** on the date on which the conditions for bringing them *definitively into force** have been fulfilled.

(j) A treaty or agreement, even though it contains provisions for provisional application, is often registered only after the definitive entry into force. In such instances, if the registering party or specialized agency specifies the dates of the provisional entry and the definitive entry into force, both dates are recorded in the register. When no reference is made to the provisional entry into force, only the definitive date is recorded and no information about the former is requested by the Secretariat. On the other hand, if only the provisional date of entry into force is given and it appears that the treaty has already entered into force definitively, the Secretariat solicits the required data from the registering party or specialized agency.[79]

114. It should be noted that these criteria have not been modified and are still valid. As a result, the criterion agreed by the Sixth Committee of the General Assembly for the purposes of registering treaties under Article 102 of the Charter of the United Nations has equated, *de facto*, provisional application with entry into force when the treaty is applied provisionally, by agreement, by two or more contracting parties. Even today, the Secretariat continues to apply this criterion in the exercise of its registration and publication functions. This would appear contrary to the terminological and substantive distinction referred to by the Special Rapporteur since his first report, in which he pointed out that, although prior to the 1969 United Nations Conference on the Law of Treaties, there might have been some confusion between the concepts of entry into force and provisional application, the Vienna Conference had clarified the distinction between the two legal regimes.[80]

115. It is important to point out, however, that both the regulations on registration and the *Repertory of Practice of the United Nations* existed prior to the adoption and entry into force of the 1969 Vienna Convention.

116. In accordance with that practice, in the context of its registration function under Article 102 of the Charter of the United Nations, the Secretariat has registered a grand total of 1,733 treaties subject to provisional application, and therefore subject to their *presumed* entry into force. This total includes bilateral treaties, closed multilateral treaties and open multilateral treaties.

117. According to the legal literature, only 3 per cent of all treaties registered with the United Nations since 1945 have been subject to provisional application.[81]

118. The diversity of State practice in regard to provisional application is also reflected in the way in which the Secretariat has traditionally proceeded to register successive actions in respect of multilateral treaties. Throughout the decades of registration under Article 102 of the Charter of the United Nations, these actions

[79] *Repertory of Practice of United Nations Organs, Supplement No. 3, vol. IV, Articles 92-111 of the Charter* (United Nations publication, Sales No.: E.73.V.2), Article 102. * Emphasis added.

[80] *Yearbook... 2013*, vol. II (Part One), document A/CN.4/664, paras. 7-24.

[81] Albane Geslin, *La mise en application provisoire des traités*, Paris, Pedone, 2005, p. 347.

have been classified in a great variety of categories, which show the diversity of provisional application clauses and options that have been submitted to the Secretariat.

119. Thus, the website of the United Nations *Treaty Series* offers 12 different search criteria with respect to actions related to provisional application, as follows: provisional acceptance, provisional acceptance/accession, provisional application; provisional application by virtue of a notification; provisional application by virtue of accession to the Agreement; provisional application by virtue of adoption of the Agreement; provisional application by virtue of signature, adoption of the Agreement or accession thereto; provisional application in respect of the Mandated Territory of Palestine; provisional application of the Agreement as amended and extended; provisional application to all its territories; provisional application under Article 23; and provisional entry into force.[82] The existence of specific references such as "Mandated Territory of Palestine", "all its territories" or "under Article 23", reflects how fields are created to cover specific treaties, thus reaffirming the difficulty of relying on a single search criterion.

120. Moreover, it is essential to note that the Secretariat registers treaties under Article 102 of the Charter of the United Nations at the express request of States. This implies that, beyond any legal views held by the Secretariat itself, what takes precedence in cases of treaties applied provisionally but not yet in force is the assessment made by States with respect to the validity of the treaty in question, as expressed through the request for registration Therefore, the States themselves decide, as we have seen, that a treaty applied provisionally has entered into force, on the basis of the criteria adopted by the Sixth Committee in the *Regulations on Registration and Publication of Treaties*.

121. The Secretariat is limited to adding different dates to its registry on the basis of information provided by the State, but without adopting a criterion that draws a meaningful distinction between provisional application and entry into force.

2. Depositary functions

122. Articles 76 and 77 of the 1969 Vienna Convention regulates the functions of depositaries. These functions include keeping custody of the treaty, receiving and keeping custody of notifications relating to it, examining whether such communications are in due and proper form, and informing the parties of acts, communications and notifications relating to the treaty.

123. The depositary functions are especially important in dealing with practical aspects such as the date of entry into force and termination of treaties, either in general or with respect to one particular State, or with respect to the date on which the treaty produces legal effects in relation to the other parties to the treaty.[83]

124. On the other hand it has been suggested that the depositary lacks the competence to determine in a definitive manner the legal effects of the notifications

[82] See: https://treaties.un.org/pages/searchActions.aspx.

[83] Shabtai Rosenne, "The Depositary of International Treaties", *American Journal of International Law*, vol. 61, No. 4 (October 1967), p. 925.

it receives, in the sense that its function cannot substantively affect the rights or obligations of the parties to a treaty.[84]

125. Accordingly, the International Court of Justice has found, for example, that depositary functions should be limited to receiving and notifying States of reservations or objections thereto.[85] This position emphasizes that the attributions of the depositary are essentially juridical and formal, limiting to the greatest extent possible any political role that might be attributed to it.[86]

126. However, the proliferation of multilateral treaties and the growing complexity of such treaties, compounded by the changes in the international community itself, including the rise of new subjects of international law, have had a direct impact on the functions of depositaries, especially with respect to the scope of their functions.[87]

127. Without a doubt, the Secretary-General of the United Nations is the depositary par excellence. The transfer of this function in the transition from the League of Nations to the United Nations was determined by the General Assembly in 1946.[88] Currently, the Secretary-General is the depositary for more than 560 muitilateral treaties.

128. In that regard, the Secretary-General, in his capacity as depositary, is also limited to performing the functions entrusted to him by the parties to a treaty, focusing on the provisions of the treaty itself.

129. As for provisional application, this means in practical terms that the Secretary-General will proceed in accordance with the terms of the multilateral treaties deposited with the Secretariat, without having competence to amend these terms on the basis of his own interpretation of what would be legally correct in accordance with the law of treaties. This is a truly complex task, since, as we have seen, States use a very wide variety of formulas to agree to provisional application of treaties, and these change without maintaining a set pattern.

130. In some cases, as in the case of the Protocol on the Privileges and Immunities of the International Seabed Authority, the depositary is limited to receiving and circulating notifications of provisional application under article 19 of the treaty, which provides as follows: "A State which intends to ratify, approve, accept or accede to this Protocol may at any time notify the depositary that it will apply this Protocol provisionally for a period not exceeding two years".[89] What is interesting in this case is that the provisional application period is limited to a maximum of two years. In depositary practice, a provision of this type, for example, simply implies that the Secretary-General would indicate, in the depositary notification, that the State in question has accepted to apply the treaty provisionally for a period of two

[84] Ibid., p. 928.

[85] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 27. See also *I.C.J. Summaries 1948-1991*, p. 25.

[86] Rosenne, "The Depositary of International Treaties", p. 931.

[87] Fatsah Ouguergouz, Santiago Villalpando and Jason Morgan-Foster, "Article 77", in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, vol. II, Oxford, Oxford University Press, 2011, pp. 1715-1753.

[88] Transfer of certain functions, activities and assets of the Leagues of Nations, General Assembly resolution 24(I) of 12 February 1946.

[89] Protocol on the Privileges and Immunities of the International Seabed Authority (Kingston, 27 March 1998), United Nations, *Treaty Series*, vol. 2214, No. 39357, p. 133.

years (or less), in accordance with the provisions of the treaty, and therefore, when this time period expires, the treaty is no longer applied provisionally.

131. Another example that could be studied is the recent International Agreement on Olive Oil and Table Olives, 2015. This treaty contains an article concerning provisional application followed by the provision on its entry into force. The two texts, if read together, are very interesting:

> Article 30. Notification of provisional application
>
> 1. A signatory Government which intends to ratify, accept or approve this Agreement, or any Government for which the Council of Members has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally when it enters into force in accordance with article 31, or, if it is already in force, at a specified date.
>
> 2. A Government which has submitted a notification of provisional application under paragraph 1 of this article will apply this Agreement when it enters into force, or, if it is already in force, at a specified date *and shall, from that time, be a Contracting Party*.* It shall remain a Contracting Party until the date of the deposit of its instrument of ratification, acceptance, approval or accession.
>
> Article 31. Entry into force
>
> 1. This Agreement shall *enter into force definitively** on 1 January 2017, provided that at least five of the Contracting Parties among those mentioned in annex A to this Agreement and accounting for at least 80 per cent of the participation shares out of the total 1,000 participation shares have signed this Agreement definitively or have ratified, accepted or approved it, or acceded thereto.
>
> 2. If, on 1 January 2017, this Agreement has not entered into force in accordance with paragraph 1 of this article, it shall *enter into force provisionally** if by that date Contracting Parties satisfying the percentage requirements of paragraph 1 of this article have signed this Agreement definitively or have ratified, accepted or approved it, or have notified the depositary that they will apply this Agreement provisionally.
>
> 3. If, on 31 December 2016, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Contracting Parties which have signed this Agreement definitively or have ratified, accepted or approved it, or have notified that they will apply this Agreement provisionally, to decide whether to bring this Agreement into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine.
>
> 4. For any Contracting Party which deposits an instrument of ratification, acceptance, approval or accession after the entry into force of this Agreement, this Agreement shall enter into force on the date of such deposit.[90]

[90] International Agreement on Olive Oil and Table Olives, 2015 (Geneva, 9 October 2015), *Multilateral Treaties Deposited with the Secretary-General*, chap. XIX, TREATIES-XIX.49.
*Emphasis added.

132. These provisions, which seem to add more confusion to a situation that is already anarchic, are particularly interesting because the State which formulated a notification of provisional application was considered a *contracting party*; the terms "provisional application", "enter into force provisionally" and "enter into force definitively" coexist in the same article, as if they were equivalent expressions; the contracting parties, via the notification of provisional application, count for the purposes of the entry into force; and, if the treaty does not enter into force within the established time periods, a mandate is given to the depositary to invite the contracting parties to decide whether the treaty will enter into force either provisionally or definitively

133. The legal doctrine has held that one of the essential elements characterizing the functions of the depositary is that it does not have the power to set criteria for the various actions that States may take in relation to a treaty.[91] The function of the depositary is governed essentially by a requirement of impartiality that considerably limits the scope of its functions.[92] But as has been pointed out, the very complex evolution of the depositary's work currently calls into question such affirmations.

134. Another current example is the Paris Agreement on climate change adopted on 12 December 2015. The decision of the Conference of the Parties to the Framework Convention on Climate Change, by which this Agreement was adopted, provides as follows: "Recognizes that Parties to the Convention may provisionally apply all of the provisions of the Agreement pending its entry into force, and *requests* Parties to provide notification of any such provisional application to the Depositary."[93] This is another example of provisional application that was not envisaged in the treaty but was rather agreed by a decision of the Conference of the Parties.

135. It is also noteworthy that some treaties on the United Nations Treaty Collection website, such as the Arms Trade Treaty, the Convention on Cluster Munitions, or the large number of treaties on commodities that contain provisions on provisional application,[94] a column on the page reflecting their status identifies any declarations of provisional application. This column is generated once the provisional application action is registered by a State, and the system updates automatically upon the deposit of successive provisional application actions.

3. United Nations publications on treaties

136. The Treaty Section of the Office of Legal Affairs has prepared a *Treaty Handbook*, whose latest revised edition was published in 2013.[95] The prologue describes the function of the *Handbook* as follows:

> This *Handbook*, prepared by the Treaty Section of the United Nations Office of Legal Affairs, is a practical guide to the depositary practice of the Secretary-General and the registration practice of the Secretariat. It is intended as a contribution to the United Nations efforts to assist States in becoming party to the international treaty framework. [...] It is presented in a user-friendly format with diagrams and step-by-step instructions, and touches upon

[91] Shabtai Rosenne, "More on the depositary of international treaties", *American Journal of International Law*, vol. 64, p. 851.
[92] Ibid., p. 840-841.
[93] FCCC/CP/2015/L.9, para. 5.
[94] See https://treaties.un.org/pages/Treaties.aspx?id=19&subid=A&lang=en.
[95] *Treaty Handbook* (United Nations publication, Sales No.: E.02.V2).

many aspects of treaty law and practice. This *Handbook* is designed for use by States, international organizations and other entities.[96]

137. The glossary of the *Handbook* reflects Secretariat practice with regard to registration and publication of treaties under Article 102 of the Charter of the United Nations, together with the depositary practice of the Secretary-General, both of which have been described in previous sections. Thus, the *Handbook* defines provisional application, distinguishing between the case of a treaty that has entered into force and that of a treaty that has not entered into force. These definitions are cited below:

> *Provisional application of a treaty that has entered into force*
>
> Provisional application of a treaty that has entered into force may occur when a State *unilaterally undertakes to give legal effect to the obligations under a treaty on a provisional and voluntary basis*.* The State would generally intend to ratify, accept, approve or accede to the treaty once its domestic procedural requirements for international ratification have been satisfied. The State may terminate this provisional application at any time. In contrast, a State that has consented to be bound by a treaty through ratification, acceptance, approval, accession or definitive signature generally can only withdraw its consent in accordance with the provisions of the treaty or, in the absence of such provisions, other rules of treaty law [...].
>
> *Provisional application of a treaty that has not entered into force*
>
> Provisional application of a treaty that has not entered into force may occur when a State *notifies the signatory States to a treaty that has not yet entered into force that it will give effect to the legal obligations specified in that treaty on a provisional and unilateral basis. Since this is a unilateral act by the State, subject to its domestic legal framework, it may terminate this provisional application at any time*.* A State may continue to apply a treaty provisionally, even after the treaty has entered into force, until the State has ratified, approved, accepted or acceded to the treaty. A State's provisional application terminates if that State notifies the other States among which the treaty is being applied provisionally of its intention not to become a party to the treaty.[97]

138. Since the Special Rapporteur already addressed the latter case, relating to unilateral notifications, in Chapter II, section A (Source of obligations),[98] of his second report, he does not consider it appropriate to deal further with it here. He merely points out that, although some favour has been expressed in both the Commission and the General Assembly for a strict interpretation of article 25 of the 1969 Vienna Convention, giving preference to agreements between the negotiating States and apparently not open to — but not excluding — the possibility that third States might decide to apply the treaty unilaterally and provisionally, the Secretariat *Handbook* describes a practice which is perhaps more extensive than might have been thought.

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[96] Ibid., p. iv.
[97] Ibid., p. 65. * Emphasis added.
[98] *Yearbook... 2014*, vol. II (Part One), document A/CN.4/675, paras. 32-43.

139. Nor can it be ignored that the *Handbook* also draws attention to the production of legal effects arising out of the provisional application of treaties, noting that States will *give effect* to the obligations derived from the treaty in question.

140. The Special Rapporteur is in no way suggesting that the *Handbook* constitutes an authoritative interpretation of the 1969 Vienna Convention. The *Handbook* itself contains a note waiving responsibility and explaining that "[t]his *Handbook* is provided for information only and does not constitute formal legal or other professional advice". Nonetheless, the *Handbook* is offered as a "guide to practice",[99] and it is logical to conclude that, as the decision was made to include these "definitions" as described above, it is because they reflect State practice with regard to registration and deposit, as discussed in the previous sections.

141. Although this topic was mentioned in the Special Rapporteur's first report,[100] it is appropriate to reiterate the way in which the *Handbook* refers to the provisional application of treaties, as follows:

> 3.4 Provisional application [...]
>
> Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994, provides "If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force". The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,[101] of 1995, also provides for provisional application, ceasing upon its entry into force. Article 56 of the International Cocoa Agreement,[102] of 2010, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.
>
> A State provisionally applies a treaty that has entered into force *when it unilaterally undertakes*,* in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the 1969 Vienna Convention). In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or

[99] *Treaty Handbook*, p. 1.
[100] *Yearbook... 2013*, vol. II (Part One), document A/CN.4/664, para. 38.
[101] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995), United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3.
[102] International Cocoa Agreement, 2001 (Geneva, 13 March 2001), UNCTAD, TD/COCOA.9/7.

denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the Vienna Convention 1969).[103]

142. This citation reveals the way in which the United Nations Secretariat understands, and therefore processes, situations involving provisional application in the performance of its functions.

143. Moreover, in response to regular requests from the General Assembly, the United Nations Secretariat prepared and published a *Handbook on Final Clauses of Multilateral Treaties*, most recently issued in 2003.[104] As the Secretary-General notes in his Foreword, the *Handbook* "incorporates recent developments in the practice of the Secretary-General as depositary of multilateral treaties with regard to matters normally included in the final clauses of these treaties".

144. In section G (Provisional application of a treaty), the *Handbook* again draws attention to the assumption of a unilateral decision as a point of departure for the implementation of article 25 of the 1969 Vienna Convention and provides some examples of provisional application clauses contained in some multilateral treaties, either before or after their entry into force.[105]

145. Furthermore, the *Handbook* reflects the distinction found in final clauses of multilateral treaties, as described in the previous section, between the definitive entry into force of a treaty and the so-called provisional entry into force.

146. It is interesting to note, however, that the two Secretariat handbooks referred to by the Special Rapporteur in the present report do not appear to call into question the obligatory character of the provisions of a treaty that States have decided to apply provisionally.

147. Moreover, in addition to the two handbooks cited above, the Secretariat uses the above-mentioned *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*.

148. Clearly, the United Nations Secretariat can record only what States provide to it, while trying to systematize the information coherently and in conformity with the 1969 Vienna Convention and the practice of States. The source of the ambiguous use of the two concepts is the States themselves, not the United Nations.

149. In conclusion, it is worth considering the merits of the idea that, in due time, the Commission should recommend to the Sixth Committee that the 1946 regulations on registration should be revised in order to adapt them to the current state of practice relating to the provisional application of treaties. This would serve as a guide to practice in line with the scope and content of article 25 of the 1969 Vienna Convention, which in turn would enable the Secretariat to reflect at a later time, both in the above-mentioned handbooks and in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the new trends in the matter that are developing in accordance with contemporary practice.

[103] * Emphasis added.

[104] *Final Clauses of Multilateral Treaties: Handbook*, United Nations publication, Sales No.: E.04.V.3, 2003.

[105] Ibid., pp. 42-43.

B. Organization of American States (OAS)

150. The Special Rapporteur held an informal consultation with the Office of Legal Affairs of the OAS General Secretariat in relation to the Organization's practice in the use of provisional application of treaties concluded under its auspices or to which it is a party.

151. The unofficial response was that, with respect to OAS and the inter-American treaties deposited with the Secretary-General, in the past 20 years no treaty had been registered that provided for provisional application before its entry into force. It was also indicated that some provisions of the inter-American treaties might have been applied provisionally, but not under the treaty itself, but rather on the basis of some later agreement between the negotiating States.

152. A partial explanation of this absence of provisional application clauses in inter-American treaties might be the fact that these treaties usually contain provisions on entry into force which require a very small number of ratifications, frequently between 2 and 6, out of a total of 35 States members of OAS, in order for the treaty to enter into force; this practice makes it somewhat less attractive or desirable to resort to provisional application.

153. As an example, some inter-American treaties open to signature and ratification or accession in the 35 States members of OAS have been identified as having entry into force clauses like the one described above.

154. Thus, article X of the Inter-American Convention on Transparency in Conventional Weapons Acquisitions provides that six instruments of ratification acceptance approval or accession by the members of OAS are required to be deposited with the General Secretariat of the Organization in order for it to enter into force.[106] The same is true of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities[107] and the Inter-American Convention against Terrorism.[108]

155. In the case of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women — "Convention of Belém do Pará", the number of ratifications necessary for entry into force is only two States.[109]

C. European Union

156. The European Union submitted a document to the Special Rapporteur containing a list of examples of recent practice in relation to provisional application of agreements with third States. This document, which lists a total of 24 referenced

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[106] Inter-American Convention on Transparency in Conventional Weapons Acquisitions (Guatemala City, 6 July 1999). Available at: http://www.oas.org/juridico/english/treaties/a-64.html.

[107] Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (Guatemala City, 6 July 1999). Available at: http://www.oas.org/juridico/english/treaties/a-65.html.

[108] Inter-American Convention against Terrorism (Bridgetown, 2 June 2002), OAS, *Acts and Documents*, OAS/Ser.P/XXXII -O/02), vol. 1, AG/RES.1840 (XXXII-O/02).

[109] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women — "Convention of Belém do Pará" (Belém do Pará, 6 September 1994). Available at http://www.oas.org/juridico/english/treaties/a-61.html.

treaties, specifies the name of the agreement, the article of the instrument that deals with provisional application and the corresponding reference of the decision by the Council of the European Union in that respect. Given the usefulness of this list, the Special Rapporteur has included it as a document annexed to the present report.

157. A recent example illustrating the constant practice of the European Union is the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.[110] Article 486 of this treaty refers to "entry into force and provisional application" as follows:

> 1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union.
>
> 2. This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval.
>
> 3. Notwithstanding paragraph 2, the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable.
>
> 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary of the following:
>
> – the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and
>
> – Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation.
>
> 5. For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to be the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article.
>
> 6. During the period of the provisional application, in so far as the provisions of the Partnership and Cooperation Agreement between the European Communities and their Member States, on the one hand, and Ukraine, on the other hand, signed in Luxembourg on 14 June 1994 and which entered into force on 1 March 1998, are not covered by the provisional application of this Agreement, they continue to apply.
>
> 7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the Depositary.

158. This provision is relevant for the purposes of the present report because, despite the fact that entry into force is, of course, subject to compliance with the requirements of the internal law of each member of the European Union, paragraph 5 expressly

[110] *Official Journal of the European Union*, L 161, 29.5.2014.

states that the date of entry into force of the Agreement is understood to be the date from which the Agreement is provisionally applied; this bears witness to the negotiating States' desire to confer on provisional application all the weight and legal effects that arise out of the entry into force of the treaty, without prejudice to the ability of any State, at any moment, to terminate the provisional application.

159. Once again, provisional application seems to be an attractive possibility in view of the uncertainty produced by the necessarily different ratification procedures in each of the 28 member States, some of which, as in the case of Belgium, require passage through three national parliaments.

160. One interesting case has been the discussion in European Union institutions — the Council, Commission and Parliament — about the advisability of putting an end to provisional application of treaties concluded with the so-called ACP States (Africa, the Caribbean and the Pacific) which deal with trade preferences, not because the Union has reached the conclusion that it will not eventually become a party to such treaties, in conformity with a strict reading of article 25, paragraph 2, of the 1969 Vienna Convention, but on the contrary because it wishes to put pressure on the other negotiating States to complete the necessary requirements for entry into force.[111]

161. This suggests that the wording of article 15, paragraph 2, has been interpreted in a broad sense to include situations that go beyond those expressly provided for in this provision, and this interpretation may imply an explicit preference in favour of provisional application in European Union practice.

D. Council of Europe

162. As in other cases, the Special Rapporteur consulted the Council of Europe Treaty Office to inquire about the practice of that regional organization on the matter. As in the case of OAS, the preliminary view, subject to a pending final opinion, was that provisional application is infrequent in the practice of the Council of Europe.

163. The Special Rapporteur's attention was drawn to a document presented at the 51st meeting of the Committee of Legal Advisers on Public International Law (CAHDI), entitled Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe.[112] This document was distributed to the members of CAHDI on a restricted basis. Suffice it to say that no reference whatsoever is made in this set of model clauses to provisional application of treaties; this would appear to confirm the above-mentioned opinion.

E. North Atlantic Treaty Organization (NATO)

164. The Special Rapporteur is grateful for the support offered by the NATO Office of Legal Affairs in the preparation of this fourth report. The information provided is

[111] Lorand Bartels, "Withdrawing Provisional Application of Treaties: Has the EU made a mistake?", *Cambridge Journal of International and Comparative Law*, vol. 1, No. 1 (2012), pp. 112-118.

[112] CAHDI (2016) 8, of 12 February 2016.

of great value to the report, as it reveals the practice of an important international organization in relation to the provisional application of treaties.

165. According to a note received from the NATO Office of Legal Affairs,[113] this international organization is party to approximately 180 treaties, only 5 of which contain provisional application clauses, 3 of them referring to transit arrangements between NATO and its partners.

166. The note also explains that there is no previously determined policy with respect to provisional application. In relation to agreements involving the establishment of NATO offices, the Organization has developed the practice by which it requests States to ensure that headquarters agreements enter into force at the time of signature.

167. However, if this is not possible under the provisions of the internal law of the State in question, the NATO resorts to provisional application from the time of signature until the entry into force of the agreement. In cases where this is unacceptable to the contracting State, NATO waits until the completion of the time periods established by the internal requirements of that State.

F. Economic Community of West African States (ECOWAS)

168. As the Special Rapporteur mentioned in the oral presentation of his third report to the Commission on 14 July 2015, he had received, on a date subsequent to the preparation and submission of the third report to the Secretariat for processing, a publication from the Ministry of Foreign Affairs of Nigeria entitled "The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS)".[114]

169. This publication is a collection of a total of 59 treaties concluded under the auspices of ECOWAS in the period 1975-2010. After an exhaustive review of the 59 treaties, it was observed that only 11 of them did not provide for provisional application. Moreover, it was particularly interesting that the formula generally used in the remaining instruments is as follows:

> The treaty shall enter into force provisionally upon the signature by Heads of State and Government and definitively upon ratification.

170. Clearly, the use of the phrase "enter into force provisionally" instead of "provisional application" confirms that States continue to draw a precise distinction between the two concepts of the law of treaties, and this has an impact subsequently on the way in which universal organizations like the United Nations perform their registration and depository functions, as we have seen above. However, the reiteration of this formula shows that the States of this region are interested in ensuring the full effectiveness of the treaties they conclude as soon as possible.

171. Only one instrument, ECOWAS Protocol A/P4/1/03 on energy,[115] refers explicitly in article 40 to its provisional application. This provision, which is quite

[113] Note dated 28 January 2016, on file with the Codification Division.

[114] *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States [1975-2010]*, Abuja, Ministry of Foreign Affairs, 2011.

[115] For the ECOWAS documents mentioned, see also www.ecowas.int/ecowas-law/.

long, sets out *in extenso* the rights and obligations arising out of provisional application as they apply to a State or regional economic integration organization.

172. The following temporal observation may also be made: from the adoption of the treaty establishing ECOWAS in 1975 until the adoption of the revised treaty in 1993, all instruments contained the same clause on provisional application.

173. For some reason, starting in 1993, this clause stops appearing in treaties concluded under the auspices of ECOWAS. It has been only since 2001 that the provisional application clause has been reincorporated in a protocol (A/SP.2/12/01), which has since remained, except in three cases: Protocol A/P.1/10/06, on the establishment of a Criminal Intelligence and Investigation Bureau; the Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials; and Protocol A/SP.1/06/06, amending the revised ECOWAS treaty, all in 2006.

174. All these examples illustrate the importance of provisional application in regional commitments of States, the relationship of such application to international organizations and its vitality in the practice of the law of treaties.

IV. Draft guidelines on the provisional application of treaties

175. The third report of the Special Rapporteur presented six draft guidelines on the provisional application of treaties.[116] During the debates in the Sixth Committee, States expressed generally favourable views of the development of such guidelines.[117]

176. As noted in the report presented by the Chairman of the Drafting Committee to the Commission on 4 August 2015,[118] the draft guidelines put forward by the Special Rapporteur in his third report were referred to the Drafting Committee, which adopted on a provisional basis, at its meetings on 29 and 30 July 2015,[119] the following three guidelines:

Draft Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Draft Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the 1969 Vienna Convention and other rules of international law.

[116] *Yearbook... 2015*, vol. II (Part One), document A/CN.4/687, paras. 130-131.
[117] See Norway (on behalf of the Nordic countries), *Official Documents of the General Assembly, seventieth session, Sixth Committee*, 23rd meeting (A/C.6/70/SR.23); Greece, United Kingdom, Slovenia, Austria, Portugal and Croatia, ibid., 24th meeting (A/C.6/70/SR.24); Poland, Vietnam, Turkey and Mexico, ibid., 25th meeting (A/C.6/70/SR.25).
[118] Provisional application of treaties. Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau. 4 August 2015. Available at: http://legal.un.org/docs/?path=../ilc/documentation/ english/statements/2015_dc_chairman_statement_pat.pdf&lang=EF.
[119] Ibid.

Draft guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.

177. It should be noted that the Drafting Committee worked in English and French; the text in Spanish is therefore a free translation by the Special Rapporteur.

178. In addition, the Drafting Committee is considering six draft guidelines (draft guidelines 4 to 9) submitted to it by the Special Rapporteur on 28 July 2015 in a revised version of the text originally presented in the third report, taking into account comments received from the members of the Commission; these draft guidelines are currently pending discussion.

179. Lastly, in addition to the draft guidelines pending consideration by the Drafting Committee, the Special Rapporteur is submitting the following draft guideline to the Commission for possible referral to the Drafting Committee. The number assigned to this new draft guideline is a continuation of the numbering of those already presented, without prejudice to the order in which the Drafting Committee decides to rearrange the draft guidelines, where necessary, in order to improve the coherence of the treatment of the topic.

Draft guideline 10
Internal law and the observation of provisional application of all or part of a treaty

A State that has consented to undertake obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule shall be without prejudice to article 46 of the 1969 Vienna Convention.

V. Conclusion

180. The Special Rapporteur considers that this report has, for the most part, dealt with the topics in which States expressed special interest during the debates in the Sixth Committee of the General Assembly at its seventieth session.

181. In addition, the Special Rapporteur wishes to thank those States that submitted comments to the Commission concerning their practice in relation to the provisional application of treaties. The Special Rapporteur again urges States that have not yet done so to submit their reports to the Commission in order to complement the information already received.

182. The Special Rapporteur considers that both the Commission and Member States have expressed their support for continuing the work on the basis of the development of guidelines that will be of practical use to States and international organizations when they decide to resort to provisional application of treaties. In his next report, the Special Rapporteur will deal with some pending topics not dealt with in the present report, such as the provisional application of treaties that enshrine rights of individuals, and will propose some model clauses, a topic that has received general support from States.